Editor's note: Appealed -- reversed and remanded for hearing, Civ.No. 86-282-K (D. WY May 13, 1988)

UNITED STATES
v.
ELMER G. THOMAS ET AL.

IBLA 84-511 Decided January 31, 1986

Appeal from decision of Administrative Law Judge Robert W. Mesch dismissing contest complaint against placer mining claims. W-84027.

Reversed.

1. Mining Claims: Common Varieties of Minerals: Unique Property -- Mining Claims: Determination of Validity

   A deposit of gravel suitable for roadbuilding will be considered a common variety of gravel under sec. 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), rather than a locatable mineral, where the record establishes the widespread availability of other deposits of gravel equally suitable for such purpose, notwithstanding the fact that the gravel deposit might be developed more economically because of the size and hardness of the gravel.

2. Mining Claims: Common Varieties of Minerals: Unique Property -- Mining Claims: Determination of Validity

   Sandstone will be considered a common variety of mineral under sec. 3 of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982), where, although the red coloration of the stone may be unique, there is no evidence that because of the coloration the stone would command a higher price on the market.

3. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability

   A mining claimant will be held not to have overcome the Government's prima facie case of the lack of discovery of a valuable deposit of bentonite where he has not rebutted evidence that the bentonite cannot be mined, removed and marketed at a profit. A mining claimant is

not permitted to aggregate the returns obtainable from sale of a nonlocatable common variety of mineral removed as overburden with those which can be obtained from mining the locatable mineral in order to support a discovery.

APPEARANCES: Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management; George L. Simonton, Esq., Cody, Wyoming, for Elmer G. Thomas, et al.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge Robert W. Mesch, dated March 28, 1984, dismissing contest complaint W-84027 challenging the validity of portions of the Big Buck Mine Nos. 3 and 4 and the Wildcat Mine Nos. 4 and 5 placer mining claims. 1/

On April 8, 1983, BLM filed a contest complaint against certain portions of appellees' mining claims, charging that "[n]o discovery of a valuable, locatable mineral deposit has been made." 2/ Appellees filed a timely answer and a hearing was held before Administrative Law Judge Mesch on September 22, 1983, in Cody, Wyoming.

The land involved herein was withdrawn from mineral entry by virtue of a classification of the land made on July 30, 1980, pursuant to section 1 of the Act of June 14, 1926 (Recreation and Public Purposes Act), as amended, 43 U.S.C. § 869 (1982). On March 26, 1981, BLM issued a recreation and public purposes (R&PP) lease, W-67847, to Park County, Wyoming, for the purpose of constructing a rifle range.

The land involved herein is asserted to be valuable for bentonite, decorative stone and gravel. The hearing and the posthearing briefs of the parties focused on whether the decorative stone and the gravel found on appellees' mining claims are "common varieties" under section 3 of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982), and whether there

1/ The mining claims are situated in the SW 1/4 sec. 14 and NW 1/4 sec. 23, T. 53 N., R. 102 W., Sixth Principal Meridian, Park County, Wyoming, near the town of Cody. The record indicates that the claims were located on Nov. 30, 1978 (Big Buck) and Dec. 7, 1978 (Wildcat) and that the following individuals are either co-locators of or persons who may have an interest in the claims and were named in the contest complaint: Elmer G. Thomas, Mark Thomas, Raymond Salverson, Ellen Arnold, Lynn H. Grooms, Sylvia I. Grooms, Donald A. Rick, Sr., George L. Simonton, Stephen L. Simonton, Lulu Shuler, Montana Mae Capron, and Joseph F. Capron.

2/ The uncontested portions of the mining claims had been declared null and void ab initio by decision, dated Jan. 5, 1982, of the Wyoming State Office, BLM, which was upheld on appeal by the Board in Elmer G. Thomas, 66 IBLA 92 (1982). This land had been subject to a first form reclamation withdrawal at the time appellees' mining claims were located.

is a valuable deposit of bentonite on each of appellees' claims. In his March 1984 decision, Judge Mesch concluded that appellees had overcome the Government's limited prima facie case that the gravel is a common variety and dismissed the contest complaint, without considering the other minerals, because the gravel was sufficient to support the validity of the claims. Therefore, we will first examine the question of whether the gravel found on appellees' claims is a common variety.

[1] Section 1 of the Act of May 10, 1872, as amended, 30 U.S.C. § 22 (1982), provides that "valuable mineral deposits" are open to exploration and purchase by mining claimants. However, section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), declares that deposits of "common varieties" of stone, sand and gravel cannot be considered valuable mineral deposits subject to location of mining claims. The latter statute also provides that the term "common varieties" does not include a mineral deposit which is valuable because it has "some property giving it distinct and special value." Id.

Certain mineral products have never been regarded as subject to location under the mining laws even though they might be marketable at a profit. Among these nonlocatable materials are those used for fill, grade, ballast, and subbase. United States v. Wirz, 89 IBLA 350, 358 (1985); United States v. Verdugo & Miller, Inc., 37 IBLA 277 (1978); see United States v. Barrows, 76 I.D. 299, 306 (1969), aff'd, Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971). Prior to the Act of July 23, 1955, an exception to the general rule was applied for certain types of ballast and base for roadbeds which conformed to engineering specifications for such use. Prior to the passage of the Act of July 23, 1955, "specification material" was regarded as locatable on the ground that inferior grades would not suffice. United States v. Bienick, 14 IBLA 290, 298 (Steubing, A. J. concurring). However, even where material was previously regarded as locatable because it met engineering standards for "compaction, hardness, soundness, stability, favorable gradation," etc., in road building and similar work, such materials have been treated as common varieties and were not locatable after passage of the Act of July 23, 1955, because materials which meet the standard are of widespread occurrence. Id. at 298.

In delineating the distinction between common and uncommon varieties in the context of a contest of a building stone placer claim, the Department has held that the statute requires comparison of the mineral deposit in issue with other deposits of such minerals generally to determine whether it has properties giving it a "distinct and special value." United States v. United States Minerals Development Corp., 75 I.D. 127, 132 (1968). The Department interpreted the 1955 Act as requiring an uncommon variety of sand, stone, gravel, etc., to meet two criteria: the deposit must have a unique property and the unique property must give the deposit a distinct and special value. Id. at 134. 3/ The special value may be for some use to which ordinary varieties of

3/ That property may not be a factor which is extrinsic to the deposit, e.g., proximity to market, even where that factor offers a competitive advantage to the deposit. United States v. Smith, 66 IBLA 182, 188 (1982).

the mineral cannot be put, or it can be for uses to which ordinary varieties of the mineral can be put if the deposit has some distinct and special value for such use. Id. If a deposit is alleged to be of an uncommon variety but it is used for the same purposes as common variety mineral material, the only practical criterion for determining whether the deposit has a distinct and special value was held to be whether the material commands a higher price in the marketplace. Id. In United States v. Mt. Pinos Development Corp., 75 I.D. 320 (1968), this standard for distinguishing an uncommon variety was applied to a sand and gravel placer claim.

Subsequently, this criterion was expanded slightly on judicial review of another building stone placer mining contest by the Ninth Circuit Court of Appeals. The court held that distinct and special value is not only manifested in a higher price, but also can be established by a showing of reduced cost or overhead to the claimant, resulting in increased profitability. In McClarty v. Secretary of the Interior, 408 F.2d 907, 908-09 (9th Cir. 1969), the court enunciated the following guidelines for determining whether a mineral deposit encompasses a common variety of mineral material:

> 1. There must be a comparison of the mineral deposit in question with other deposits of minerals generally;
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> 2. The mineral deposit in question must have a unique property;
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> 3. The unique property must give the deposit a distinct and special value;
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> 4. If the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use;
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> 5. The distinct and special value must be reflected by the higher price which the material commands in the market place, or by reduced cost or overhead so that the profit to the claimant would be substantially more.

When the Government contests a mining claim, it assumes the burden of going forward with sufficient evidence to establish a prima facie case of invalidity, whereupon the burden shifts to the claimant to overcome the Government's case by a preponderance of the evidence. United States v. Anderson, 83 IBLA 170, 175 (1984), and cases cited therein. The testimony of a qualified Government mineral examiner that he has examined a claim and has found it not to be supported by the discovery of a valuable deposit of a locatable mineral is sufficient to establish the Government's prima facie case. Id.

In the present case, the Government presented the testimony of Robert B. Ross, Jr., a BLM mineral examiner, who examined each of appellees' mining claims and concluded that the gravel was located on the eastern portion of

the claims, overlying bedrock composed of medium gray sandstone interbedded with bentonite, muddy sandstone and shale (Tr. 13-15, 45, Exh. 2-2). The gravel is covered with a "thin veneer of essentially surface fragments of limestone and such" (Tr. 15). The bedrock outcrops in the western portion of the claims and dips to the east. (Tr. 14-15, Exh. 2-2). Ross estimated the thickness of the gravel to be from 13 to 41 feet, averaging 24 feet, based on drilling done on the claims (Tr. 46, 82). Ross testified that, although the gravel was not tested, he observed it in outcrops and in the materials recovered when drilling. He also testified that, when the gravel on the claims was compared with gravel from other pits in the general area, the gravel on the claims was found to be "essentially the same as * * * gravel elsewhere in essentially all the other pits that I have seen" (Tr. 78, 85-88).

In rebuttal, appellees presented the testimony of several witnesses to the effect that the gravel is unique in the area of appellees' mining claims because it is soft and of a uniformly smaller size, thus, requiring little or no crushing for its "principal use," i.e., subbase for road construction (Tr. 94-95, 103, 108, 124, 129, 150, 158-59). Robert Fontaine, general manager of Althoff Construction, a road construction firm, testified that the gravel would save two and one-half dollars per cubic yard in crushing costs for use as subbase (Tr. 98, 102-03). However, he testified other uses would require sizing, crushing, and washing (Tr. 100-01). Don Lanchbury, a self-employed contractor who has been involved in all phases of construction, testified that "comparable" gravel is not available within 5 or 10 miles of Cody, and that the nearest comparable deposit (Chapman Bench) is 20 to 25 miles from Cody (Tr. 109). Melvin J. Pack, a senior geologist with the All Minerals Corporation, which conducted a portion of the test drilling on the claims, testified that the gravel has no special use, i.e., it can be used "for most anything that you could use any of the other gravel around" (Tr. 151). He further stated that the fact that the gravel could be used "pit run," i.e., with no crushing, for graveling roads and subbase would reduce the processing costs "significantly" (Tr. 152). However, Pack acknowledged that, for use in concrete, asphalt, and actual base, processing would be necessary (Tr. 152-53).

In his March 1984 decision, at page 6, Judge Mesch concluded that appellees had overcome the Government's prima facie case that the gravel found on appellees' claims is of a common variety, by establishing that it has "unique physical properties which give it a distinct and special economic value over at least some other gravel deposits in the area." In so holding, Judge Mesch considered the following statement made in United States v. Guzman, 18 IBLA 109, 125, 81 I.D. 685, 692 (1974):

> Likewise, the Department has consistently held that deposits of sand and gravel suitable for all construction purposes, which may be superior to other deposits of sand and gravel found in the area because it is free of deleterious substances, and because of hardness, soundness, stability, favorable gradation, nonreactivity and nonhydrophilic qualities, but which is used only for the same purposes as other widely available, but less desirable deposits

> of sand and gravel are, nonetheless, a common variety of sand and gravel. United States v. Mt. Pinos Development Corp., 75 I.D. 320 (1968); United States v. Ramstad, A-30351 (September 24, 1965); United States v. Basich, A-30017 (September 23, 1964); United States v. Hensler, A-29973 (May 14, 1964); United States v. Henderson, [68 I.D. 26 (1961)].

Judge Mesch concluded that he could not reconcile the statement in Guzman with the holding in McClarty that a mineral may not be considered a common variety where, although it is used for the same purposes as ordinary varieties of minerals, it has a distinct and special value by virtue of a higher price or reduced cost or overhead. Judge Mesch stated in his decision, at page 5, that the statement in Guzman "is not, and was not at the time it was written, a correct statement of the law."

In its statement of reasons for appeal, BLM argues at some length that Guzman and McClarty are not inconsistent and that, applying Guzman, appellees' gravel is properly deemed a common variety. We agree. In the past the Department has expressly disclaimed an end use test which would automatically disqualify all locations of mineral materials such as building stone which are usable for the same purposes as common varieties of such mineral materials. See United States v. United States Minerals Corp., supra at 132-33. However, this does not mean, as the Guzman opinion recognizes, that the mere fact that one deposit of gravel has certain limited economic advantages over another when used in a manner for which common varieties of gravel are suited makes that deposit uncommon. United States v. Guzman, supra at 124, 81 I.D. at 692; accord, United States v. Dunbar Stone Co., 56 IBLA 61 (1981), aff'd, Dunbar Stone Co. v. Watt, Civ. No. 81-1271-331 (D. Ariz. Feb. 27, 1984), appeal filed, Civ. No. 84-1915 (9th Cir. Apr. 24, 1984). As BLM notes, the Board in Guzman, relying on a number of other cases, merely recognized that the standard under McClarty for judging common varieties is a two-part test, i.e., the mineral must have a unique property and that property must impart a distinct and special value to the mineral. 4/

In effect, the decision appealed from ignored the requirement that the purported property, which gives the mineral its distinct and special value, must be unique. Although the gravel deposit now in issue has certain advantages for subbase and possibly certain other roadbuilding applications (i.e., if produced for subbase, it could be produced at a lower cost), there is no evidence that other widely available materials, although less desirable, including the other gravel in the area, would not be equally satisfactory for that same purpose. Indeed, Ross testified that the gravel is "essentially the same" as other gravel in the area and Pack testified that it has no special use. In fact, a careful review of the transcript leads to the conclusion

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4/ This was also recognized in McClarty v. Secretary of the Interior, supra, when the court noted that for the variety to be uncommon, the "profit to the claimant would be substantially more." (Emphasis added.) Gradation of size and hardness is common. What must be shown is a gradation or variance in hardness which causes the deposit to be recognized as unusual.

that the only use for which a "substantial" reduction of cost may result is as a subbase in road construction. However, as previously noted, material used as subbase has never been considered to be a locatable mineral. In addition, the fact that a common variety mineral deposit is more valuable because of its proximity to the market does not, standing alone, establish an uncommon variety. United States v. Smith, supra at 188. As BLM states, the question is whether there is a readily available substitute for a particular purpose. Where there is such a substitute, the particular property which makes the mineral under review more desirable for that purpose cannot be considered unique.

[2] We, therefore, turn to the question of whether the decorative stone found on appellees' mining claims is a common variety. The testimony established the existence of at least two types of "moss rock" or lichen-encrusted sandstone which outcrop on the western portion of appellees' claims. Both types are used for facing fireplaces and other ornamental purposes (Tr. 36). Ross testified, on behalf of the Government, that the moss rock found on appellees' claims is "fairly typical of moss rock exposed throughout the region" (Tr. 36). One type of moss rock is a white silicified sandstone which Ross determined, based on showing a sample to the "only two stone dealers in the region," would sell for approximately $ 150 per ton (Tr. 37-38, 42). The other type, which appellees rely upon, is a red sandstone. Ross testified that similar rock is found at "numerous sites" around the Big Horn Basin, including a site operated by BLM near appellees' claims (Tr. 56, 84-85). Ross testified that the red sandstone is "extremely prevalent" and that it is not unique when compared with other building stones in Cody (Tr. 69-70, 81). Ross testified that moss rock generally sells in Billings for between $ 95 and $ 165 per ton (Tr. 38). Finally, Ross testified that neither of the varieties of sandstone found on appellees' claims has a distinct and special value "above and beyond other similar decorative building stone" (Tr. 44).

On behalf of appellees, Lanchbury testified that there is not much of the "red rock" in the Big Horn Basin (Tr. 111-12). Similarly, Elmer G. Thomas, one of the appellees, testified that he has not seen any other deposit of such rock, with its particular shade of red, anywhere else in the Big Horn Basin (Tr. 121-22). He testified that the color and quantity of the rock found on the claims are unique (Tr. 123). Claude Brown, a self-described rockhound, testified that the red rock would make better building stone than other moss rock because of its color and hardness (Tr. 144). However, he also testified that he didn't know whether the red sandstone would actually command a higher price in the market than sandstone of any other color (Tr. 145). Lynn H. Grooms, one of the appellees and a co-locator of the claims, testified that the color of the red rock is unique in the Big Horn Basin and that it would be profitable to mine the rock (Tr. 160-61). Grooms testified that the rock could be mined and sold for a profit and that it would still be profitable to mine the rock even if it were shipped and sold in Billings, Montana, Fort Collins, Colorado, or Farmington, New Mexico (Tr. 161, 174). Grooms further testified that the rock is "three times" more valuable than "any other rock in the basin" because of its unique color (Tr. 162-63).

He testified that he had been offered approximately $ 30 per ton at one point for a pickup load but had not contacted any other potential buyers (Tr. 172). No evidence was presented, for example, that appellees had, or could establish a market for the red sandstone at a premium over the white sandstone, which they admit to be common. The offer to buy by a local mason (who was related to one of the locators) can be considered to be no more than an isolated offer.

We conclude that the Government established a prima facie case that the decorative stone found on appellees' claims is a common variety based on the testimony of the Government mineral examiner that the stone does not have a unique property, which imparts to it a distinct and special value. Even if we accept that the particular color of the stone is unique, appellees have presented no evidence that by virtue of its color red sandstone would command a higher price in the market. Appellees have not overcome the Government's prima facie case. United States v. Smith, supra; United States v. Dunbar Stone Co., supra.

[3] We turn, finally, to the question of whether the bentonite found on appellees' mining claims constitutes a valuable mineral deposit. A "valuable mineral deposit" has been discovered where minerals have been found in such quantity and quality as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. 313 (1905). This so-called "prudent man" test has been augmented by the "marketability test," which requires a showing that the mineral may be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968). In addition, where land is closed to location and entry under the mining laws subsequent to the location of a mining claim, the claimant must establish the discovery of a valuable mineral deposit at the time of the withdrawal, as well as the date of the hearing. Cameron v. United States, 252 U.S. 450 (1920); Clear Gravel Enterprises v. Keil, 505 F.2d 180 (9th Cir. 1974).

Ross testified, on behalf of the Government, that two sets of drill holes were made on the claims. The results of the first drilling, done in March 1982, were considered unreliable because the samples were considered to be contaminated (Tr. 17-19; Exh. 2 at 8). The second drilling was done during August and September 1982 by All Minerals on the eastern portion of appellees' claims in order to intersect an anticipated 12-foot thick bed of bentonite (Exh. 2 at 8). The inferred existence of the bed was based on geologic projections from an exposure of bentonite 3/4 of a mile south of the Wildcat Mine No. 4 claim. Id. Drill hole NC-25 intersected two beds of bentonite, with thicknesses of 4.4 and 2.1 feet. Id. Other drill holes intersected beds ranging from 2 to 5.5 feet in thickness. Id.

Ross testified that some of the bentonite would "probably" be suitable for "drilling mud or other uses to which bentonite is put" based on testing of the bentonite samples (Tr. 20-21; Exh. 2 at 14). Ross constructed a cross section of the bentonite beds based on a 340-foot east-west line of drill holes (from NC-26 to NC-23) in the Wildcat Mine No. 4 claim (Tr. 21). The

cross section is depicted on exhibit 2-4. The exhibit depicts an upper and a lower bentonite bed with some bentonite "stringers," up to 6 inches in thickness, located between a surface layer of sand and gravel and a lower muddy sandstone bed (Tr. 22, Exh. 2-4). The bentonite beds dip 27 degrees and are separated by a vertical distance of 75 feet (Tr. 21, 24). The layer of sand and gravel is about 20 feet thick. Ross testified that the upper bed disappeared between drill holes NC-25 and NC-26 probably due to faulting, rather than pinching out (Tr. 23).

In a mineral report (Exh. 2), dated January 14, 1983, Ross calculated the mining costs and return from mining the upper portion of the lower bentonite bed, to a depth of 40 feet, under the Wildcat Mine No. 4 claim, concluding that the bed was the most favorable occurrence of bentonite (Exh. 2 at 14-15). Ross testified that if the bed, which was of a higher quality and a greater thickness than any of the other beds, could not be mined at a profit, mining the other beds would result in a "greater loss" (Tr. 24). Ross estimated that the lower bed, projected 1,320 feet north-south under the claim, contained 10,840 tons or 7,859 recoverable tons (Tr. 25, Exh. 2 at 14). Ross testified that this projection probably overestimated the amount of commercial bentonite (Tr. 32). Ross calculated mining costs at $ 15.85 per ton, including the cost of removing the sand and gravel overburden (Tr. 25, Exh. 2 at 16). Ross also calculated the average cost of processing bentonite at $ 9.10 per ton (Tr. 26, Exh. 2 at 15). Using an average sales price of $ 21.80, where the reported sales prices in the Big Horn Basin ranged between $ 10 and $ 33, Ross concluded that there would be a net loss per ton of $ 3.15 (Tr. 26, Exh. 2 at 15). Ross testified that the costs and the sales price remained fairly stable between 1978 and 1983 (Tr. 33-34). In his report Ross stated that the bentonite underlying appellees' claims could not be mined, removed and marketed at a profit (Exh. 2 at 15). Ross also testified to this effect (Tr. 35).

Contestee Thomas offered the following testimony regarding the bentonite deposit in response to questioning by the Government's attorney:

> Q Okay. Did you agree that mining the bentonite on these claims wouldn't be profitable until after you had stripped the sand and gravel off?
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> A Well, the way it looks right now, possibly not. But I think there's a lot more bentonite than what we've found there, in my own opinion, is all.
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> Q But you don't have any evidence of that, but --
>
> A No.

(Tr. 129). Pack also testified that the claims do not have "much potential for bentonite" (Tr. 147). He further testified that the claims are not a commercially "viable bentonite property" given the overburden of sand and gravel and the quality of the bentonite (Tr. 149). However, he testified that, if the sand and gravel were locatable it could be sold at a "very fine

profit" and there would be a "commercial" deposit on the Wildcat Mine Nos. 4 and 5 claims, but he did not have enough evidence as to the Big Buck Nos. 3 and 4 claims (Tr. 149, 153).

We conclude that the Government established a prima facie case of the lack of discovery of a valuable deposit of bentonite on appellees' claims based on the testimony of the Government mineral examiner. A mining claimant is not permitted to aggregate the returns obtainable from mining a nonlocatable common variety of mineral with those which can be obtained from mining the locatable mineral in order to support a discovery. 5/ This is true even though the common variety mineral deposit must be mined in order to reach the deposit of locatable minerals. United States v. Foresyth, 15 IBLA 43, 60 (1974). Thus, even if the gravel involved herein could be sold in the course of reaching the bentonite beds, the return from such sale could not be used to offset the cost of removal required to reach the bentonite. Appellees have presented no evidence to dispute the mineral examiner's conclusion that the bentonite does not satisfy the marketability test. Indeed, both Thomas and Pack acknowledged in testimony that the test is not satisfied.

Accordingly, we find from the record after hearing that the Government has established a prima facie case that appellees' mining claims are invalid. Further, we find that the evidence tendered by appellees has failed to rebut the prima facie case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the mining claims are declared null and void.

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C. Randall Grant, Jr.
Administrative Judge

We concur:

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Wm. Philip Horton
Chief Administrative Judge

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R. W. Mullen
Administrative Judge

5/ The most common example is placer gold. In order for a gold placer claim to be valid, the gold contained in the gravel must support the discovery. The value of the sand and gravel which would be removed in placer operations cannot be deducted from the mining costs.